

No. 15938 ✓

United States
Court of Appeals
for the Ninth Circuit

IRVING I. BASS, Trustee in Bankruptcy of Zipco,
Inc., a Corporation, Bankrupt,
Appellant,

vs.

ROBERT H. SHUTAN,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

APR 18 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

CRAIG, WELLER AND LAUGHARN,
WILLIAM E. BARTLEY,
111 West 7th Street,
Los Angeles 14, California.

For Appellee:

ROBERT H. SHUTAN,
433 So. Beverly Drive,
Beverly Hills, California.

In the United States District Court for the
Southern District of California, Central Division

No. 71250-WM

In the Matter of

ZIPCO, INC., a California Corporation,

Debtor.

IN PROCEEDINGS FOR AN
ARRANGEMENT

To the Honorable Judge of the District Court of the
United States, for the Southern District of
California, Central Division:

The petition of Zipco, Inc., a California Corporation,
of the City of Los Angeles, County of Los
Angeles, State of California, engaged in the busi-
ness of operating a drill jig bushing manufacturing
business, respectfully represents:

I.

Your petitioner has had its principal place of
business at Los Angeles within the above judicial
district for a longer period of the six months im-
mediately preceding the filing of this petition than
in any other judicial district.

II.

No bankruptcy proceeding, initiated by a petition
by or against your petitioner, is now pending.

III.

The debtor is a person who could become a bankrupt under [2*] Section 4 of the Bankruptcy Act, 11 U.S.C.A. Section 22, and is not a municipality, railroad, insurance or banking corporation, or a building and loan association.

IV.

That your petitioner is unable to pay its debts as they mature and proposes an arrangement for the payment of its unsecured creditors under Chapter XI, Section 322 of the Bankruptcy Act, 11 U.S.C. Section 722, which is contained in Exhibit A annexed hereto and made a part hereof.

V.

That your petitioner will file Schedule A within ten days from the date hereof as per Court Order.

VI.

That your petitioner will file Schedule B within ten days from the date hereof as per Court Order.

VII.

That the statement attached hereto, marked Exhibit "1," and verified by your petitioner's oath, contains a full and true statement of its executory contracts, as required by the provisions of said Act.

Wherefore, your petitioner prays that proceedings may be had upon this petition in accordance

*Page numbering appearing at foot of page of original Certified Transcript of Record.

with the provisions of Chapter XI of the Act of Congress relating to bankruptcy.

Dated: April 4, 1956.

ZIPCO, INC.,
A California Corporation.

By /s/ MILO M. TURNER,
President.

/s/ ROBERT H. SHUTAN,
Attorney for Petitioner. [3]

EXHIBIT A

In the United States District Court for the
Southern District of California, Central Division

No. _____

IN the Matter of

ZIPCO, INC., a California Corporation,

Debtor.

PROPOSED PLAN OF
ARRANGEMENT

Zipco, Inc., the debtor above named, proposes the following arrangement with its unsecured creditors:

I.

Classification of Unsecured Creditors

The unsecured debts of the debtor are divided into the following classes:

a. Expenses of administration incurred herein which may be approved, allowed or ordered paid by the Court;

b. All debts which have priority under Section 64a (2), (4) and (5) of the Act of Congress relating to bankruptcy;

c. All unsecured debts.

II.

Provisions Modifying or Altering the Rights of Unsecured Creditors

The debtor proposes to pay the unsecured creditors in the following manner:

a. Administration expenses— [4]

The debtor will pay the actual costs of administration of the debtor estate as fixed by the Court, and the necessary amounts to be expended for filing and indemnity fees, and the respective attorneys for parties entitled to compensation out of this estate, as, if and when the same are allowed by the Court.

b. Priority debts—

(1) Labor claims. All labor claims entitled to priority shall be paid as soon as moneys are available for that purpose, without awaiting formal confirmation of this Plan of Arrangement.

(2) Tax claims. The debtor proposes to pay all tax claims in full as prior tax claims in such manner and at such time as the various taxing agencies shall agree.

c. To the holders of claims in Class c, the debtor proposes to pay one hundred per cent of the amount

of their claims by the issuance of non-interest bearing negotiable promissory notes to each of said creditors, said notes to be payable in twenty-four equal monthly payments, the first of said payments to be due sixty days after the entry of an order confirming the arrangement.

III.

Provisions for Continuation of Debtor's Business

It is proposed that the business of the debtor, pending the confirmation of this proposed Plan, shall be continued, either by the debtor under the supervision of a creditors committee, or by a Receiver to be appointed by this Court. That the debtor has skilled personnel in its employ; has very considerable work in process and has substantial and satisfactory orders for the sale of its products. That it would be completely disastrous to the welfare of this business and therefore the creditors that there be an interruption or cessation of operation; that the work in process if not completed, would have [5] the value of a very small fraction that it would have after being processed.

IV.

Provisions for Payment of Debts Incurred During Pendency of Arrangement

All debts incurred after the filing of the petition and prior to the confirmation of the arrangement shall be paid in cash when due and shall have priority in payment over debts affected by this arrangement.

V.

Jurisdiction of the Court

The Court shall retain jurisdiction until the deposit and distribution of the money and notes provided for in Article II hereof.

VI.

That upon completion by the debtor of the obligations assumed herein, these proceedings shall thereupon terminate, and the debtor shall be entitled to manage his affairs.

VII.

Possession of Assets

The debtor being firmly convinced that the main interests of creditors lies in the continuity of operation of the business would not object to the appointment of a Receiver by the Court, if this, in the opinion of the Court would be in the best interests of creditors; although management of the debtor is prepared and willing to carry forward with responsible management of an operation by the debtor, subject to supervision of a creditors' committee.

Dated: At Los Angeles, California, this 4th day of April, 1956.

ZIPCO, INC.,

A California Corporation;

By /s/ MILO M. TURNER.

By /s/ ROBERT H. SHUTAN,

Attorney for Debtor. [6]

EXHIBIT I

Statement of Executory Contracts
Zipco, Inc.

Monthly
Obligation

- 1. Lease on business premises
at 6218 Wilton Place,
Jan and Charlotte Lustig, Lessors.....\$ 625.00
- 2. Leases on Machinery and Equipment
 - Boothe Leasing 1,500.00
 - International Leasing Corp. 189.00
 - Masco Machinery 210.00
- 3. Conditional Sales Contract on Equipment
 - Union Bank & Trust 252.00
 - Commercial Credit Corp. 152.00
 - I.B.M. 71.00
 - Pepsi Cola Co. 20.00
 - Aetna Factors Co. 500.00

ZIPCO, INC.,

By /s/ MILO M. TURNER,
President.

State of California,
County of Los Angeles—ss.

Milo Turner, being first duly sworn, deposes and
says that the above statement of executory contracts
is a full and true statement thereof.

/s/ MILO M. TURNER.

Subscribed and sworn to before me this 4th day of April, 1956.

[Seal] /s/ ROBERT FEINERMAN,
Notary Public in and for Said
County and State. [8]

EXHIBIT A

RESOLUTION AUTHORIZING FILING OF PETITION UNDER CHAPTER XI OF THE BANKRUPTCY ACT

Whereas, it appears to be for the best interests of the corporation, and those interested therein, that a Debtor's petition under Chapter XI of the Bankruptcy Act be filed in order to preserve the assets of the corporation, and to make an equitable arrangement with its creditors:

Now, Therefore, Be It

Resolved: That in the judgment of the Board of Directors, it is desirable and for the best interests of this corporation, its creditors, stockholders, and other interested parties that a petition be filed by this corporation proposing an arrangement under the provisions of Chapter XI of the Act of Congress relating to bankruptcy; and it is further

Resolved: That petition under said Chapter XI shall be filed as shall be submitted by the President of the corporation, and the same hereby is approved

and adopted in all respects, and the President of this corporation is hereby authorized and directed on behalf of and in the name of the corporation to execute and verify such petition and to cause the same to be filed with the District Court of the United States for the Southern District of California, Central Division; and it is further

Resolved: That the officers of this corporation be, and they hereby are, authorized to execute and file all petitions, schedules, lists and other papers, and to take any and all action which they may deem necessary or proper with a view to the successful termination of such proceedings.

I, Stanley C. Sorenson, do hereby certify that I am the Secretary of Zipco, Inc., a California corporation, and that the above is a full, true and correct copy of a resolution of the Board of Directors of said corporation passed and adopted by said Board at a special meeting of the Board of Directors of said corporation duly held and convened on Wednesday, April 4, 1956, and that the same is spread in full upon the Minute book of the corporation.

Dated: April 4, 1956.

/s/ STANLEY C. SORENSON,
Secretary.

[Endorsed]: Filed April 5, 1956. [9]

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND
ORDER OF REFERENCE UNDER SEC-
TION 322 OF THE BANKRUPTCY ACT

At Los Angeles, in said District, on April 5, 1956, before the said Court the petition of Zipco, Inc., a corporation, that he desires to obtain relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Joseph J. Rifkind, one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Zipco, Inc., shall attend before said referee on April 12, 1956, and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Wm. C. Mathes, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on April 5, 1956.

JOHN A. CHILDRESS,
Clerk;

By /s/ REX LAWSON,
Deputy Clerk.

[Endorsed]: Filed April 5, 1956. [10]

[Title of District Court and Cause.]

ORDER APPROVING APPOINTMENT
OF TRUSTEE

At Los Angeles, in said district, on the 31st day of May, 1956, Irving I. Bass, of Los Angeles, California, having been appointed trustee of the estate of the above-named bankrupt by the creditors of said bankrupt, as provided in the Act of Congress relating to bankruptcy,

It Is Ordered that the appointment of said Irving I. Bass, as trustee be, and it hereby is, approved, and the amount of his bond is fixed at \$5,000.00 dollars.

JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed May 31, 1956. [12]

[Title of District Court and Cause.]

ADJUDICATION OF BANKRUPTCY

At Los Angeles, Calif., in said District, on the 11th day of May, 1956.

The petition of the debtor for an arrangement under Chapter XI of the Bankruptcy Act filed on the 5th day of April, 1956, having been withdrawn and said debtor having consented to being adjudged a bankrupt under the Act of Congress relating to bankruptcy, and there being no opposing interest;

It is adjudged that the said Zipco, Incorporated, is a bankrupt under the Act of Congress relating to bankruptcy.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed May 15, 1956. [11]

[Title of District Court and Cause.]

PROOF OF CLAIM AND
POWER OF ATTORNEY

(1) Name of Claimant: Robert H. Shutan.

State of California,
County of Los Angeles—ss.

Robert H. Shutan, of 433 South Beverly Drive, City of Beverly Hills, County of Los Angeles, State of California, being duly sworn, deposes and says:

That the above-named bankrupt was at and before the filing by or against him of the petition for adjudication of bankruptcy, and still is, justly and truly indebted or liable to Robert H. Shutan in the sum of \$1,531.45.

That the consideration of said debt or liability is as follows: Wages earned within 3 months preceding the commencement of these proceedings as evidenced by payroll checks (as per attached Exhibit) all of which, together with all rights and claims per-

taining thereto for full and valuable consideration, were duly assigned to claimant.

That no part of said debt or liability has been paid and that there are no set-offs or counterclaims thereto; that said claimant does not hold, and has not, nor has any person by his order, or to deponent's knowledge or belief, for his use, had or received, any security or securities for said debt or liability; that the instrument upon which said debt or liability is founded is attached hereto, or is lost or destroyed as set forth in the affidavit attached hereto; that no note or other negotiable instrument has been received for said debt or liability, or any part thereof, except such as is attached hereto; and that no judgment has been rendered on said debt or liability, or any part thereof, except as herein stated.

Designation of Address to Which Notices Shall Be Addressed:

Said claimant hereby requests that all notices to which he may be entitled shall be addressed to the person named in the foregoing Power of Attorney, at his address as therein designated; if no person is named in said Power of Attorney, said claimant requests that said notices be sent to him at the following address:

433 South Beverly Drive,
Beverly Hills, California.

/s/ ROBERT H. SHUTAN,
Deponent.

Subscribed, sworn to and acknowledged before me this 19th day of June, 1956.

[Seal] /s/ ROSE BERGER,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed June 21, 1956. [13]

[Title of District Court and Cause.]

OBJECTIONS TO CLAIMS AND NOTICE OF HEARING OF OBJECTIONS

The undersigned, the duly elected, qualified and acting Trustee in Bankruptcy herein, files his objections to claims which have been filed in these proceedings, and as and for his objections thereto, alleges as follows:

Robert H. Shutan,
433 South Beverly Drive,
Beverly Hills, California.

Claim No. 79—Amount: \$1,531.45.

This claim is based on alleged assignments of checks issued for wages to employees of the bankrupt. Your Trustee is informed and believes that in fact no wages were assigned to the claimant; that in fact the bankrupt and not the claimant paid the claimants, and upon such payment these checks

became the property of the bankrupt who then assigned the same to the claimant and that the same therefore did not constitute the assignment of wages or wage claims to the claimant. The California law requires consent, in writing, of the spouse of one who assigns wages and provides that any assignment without the consent of the wife is void. Your petitioner is informed and believes that the claimant did not comply with this requirement and therefore alleges the alleged assignments to be void.

This claim is for legal services rendered in the filing of Chapter XI proceedings and is excessive. The Court should determine the correct amount of the claim and allow the same as a general unsecured claim only.

Wherefore, your Trustee prays that his Objections be heard and appropriate Orders be made in the premises.

/s/ IRVING J. BURNS,

Trustee in Bankruptcy.

To the Above Creditors and Their Attorneys:

You Are Hereby Notified that the Trustee in Bankruptcy herein has made and filed herein his written Objections to claims, as hereinbefore set forth, and the same have been set for hearing before the Honorable Joseph J. Rifkind, Referee in Bankruptcy in the Federal Building, Los Angeles, California, on the 9th day of July, 1957, at the hour of 10:00 o'clock a.m.

Dated: June 17, 1957.

CRAIG, WELLER &
LAUGHARN,

By /s/ WILLIAM E. BARTLEY,
Attorneys for Trustee.

[Endorsed]: Filed June 21, 1957. [15]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER RE CLAIM OF ROB-
ERT H. SHUTAN

The matter of the Trustee's objections to the prior wage claim of Robert H. Shutan in the amount of \$1,531.45, designated by the Court as Claim No. 79, having come on for hearing before the undersigned Referee in Bankruptcy on July 9, 1957, at 10:00 o'clock a.m., and the matter having been continued from time to time until August 8, 1957, at 2:00 o'clock p.m., at which time the said matter was regularly called and came on regularly for hearing, the Trustee appearing by and through his counsel, Craig, Weller & Laugharn, by William E. Bartley of counsel, and the claimant appearing in propria persona, and evidence both oral and documentary having been offered and received into evidence, and the Court being fully advised in the premises, the Court does hereby make the following Findings of Fact, Conclusions of Law and Order based thereon:

Findings of Fact

I.

That at all times herein mentioned, Milo M. Turner [18] was the President, sole stockholder and general manager ever since the formation of the bankrupt corporation. That all of the debts of said corporation set forth in the schedules on file were contracted by and under the control and direction of said Milo M. Turner.

II.

That for some time prior to bankruptcy and until immediately prior to bankruptcy, said Milo M. Turner was the only acting officer and director of the bankrupt corporation; that immediately prior to the filing of the bankruptcy proceedings herein, said Milo M. Turner appointed and designated one Stanley M. Sorenson as Secretary of the bankrupt corporation solely for convenience and in order that he could sign the Petition for Arrangement and schedules of assets and liabilities under Chapter XI of the Bankruptcy Act, as Secretary, with said Milo M. Turner as President.

III.

That several days prior to the filing of the arrangement proceedings, and on or about March 28, 1956, Milo M. Turner consulted Robert H. Shutan, an attorney at law, relative to the financial affairs of and for the purpose of filing arrangement proceedings on behalf of the bankrupt corporation, and said attorney did prepare and cause to be filed a

Petition for Arrangement under Chapter XI of the Bankruptcy Act and he did represent said bankrupt corporation in connection therewith and the bankruptcy proceedings ensuing therefrom.

IV.

That Milo M. Turner prior to the filing of the Petition for Arrangement under Chapter XI by the bankrupt corporation, paid various wage claims of the bankrupt corporation with checks of the bankrupt corporation which were dishonored by the bank upon which the same were drawn because of insufficient funds. That [19] said Milo M. Turner thereupon paid said employees in cash for the various payroll checks of the bankrupt corporation which had not been honored by the bank, and which checks thereupon were delivered to the said Milo M. Turner by the payees and holders of said checks totalling the sum of \$1,531.45.

V.

That on or about April 4th, 1956, Milo M. Turner transferred and delivered to Robert H. Shutan in payment of his retainer of \$1,500.00 for the legal services rendered and to be rendered as aforesaid the said checks which had been turned over to Milo M. Turner, referred to in the preceding paragraph. That Robert H. Shutan has filed a priority wage claim based upon said checks delivered to him. That the Trustee has objected to the priority of said claim as a priority wage claim and to the reasonable value of the charge of said claimant.

VI.

That Robert H. Shutan acted as the attorney of record for the bankrupt corporation both in Chapter XI proceedings and subsequent bankruptcy proceedings, after adjudication.

Conclusions of Law

I.

That said bankrupt corporation is the alter ego of Milo Turner and he is generally liable for the debts of said corporation contacted under his supervision and control. That Robert H. Shutan was in a fiduciary relationship with the bankrupt corporation and with Milo M. Turner. That any claims that Milo M. Turner has should, in equity and good conscience, be subordinated in payment to general creditors. That Robert H. Shutan, as his attorney and attorney for the corporation, and as assignee, stands in no better position than would be assignor, Milo M. Turner. [20]

II.

That if Milo M. Turner had asserted a claim based upon the above-mentioned checks, the said claim would not have been entitled to priority under Section 64-a(2) of the Bankruptcy Act, and the said claim would have been subordinated in payment to the payment of all other general claims on file in the within bankruptcy proceeding.

III.

That Robert H. Shutan could obtain no greater rights than his assignor, Milo M. Turner.

IV.

That the fee of Robert H. Shutan, as attorney for the bankrupt, is subject to determination and review by the Court under Section 60-d of the Bankruptcy Act, United States Code, Title XI, Chapter 6, Section 96.

Order

It Is Hereby Ordered that Claim No. 79 of Robert H. Shutan in the amount of \$1,531.45 is hereby denied any prior status; and

It Is Further Ordered that the said claim is allowed as a general unsecured claim only; and

It Is Further Ordered that the said claim be, and the same is, hereby subordinated in payment to the payment of all other general unsecured claims herein; and

It Is Further Ordered that denial of this claim shall be without prejudice of the right of Robert H. Shutan to duly present Petition for Fees as Attorney for the Bankrupt to this Court.

Dated September 4, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

Received September 3, 1957.

[Endorsed]: Filed September 4, 1957. [21]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF
REFEREE'S ORDER

To the Honorable Joseph J. Rifkind, Referee in
Bankruptcy:

The petition of Robert H. Shutan respectfully
represents:

1. That your petitioner is a creditor of the above-
named bankrupt and a claimant in this estate.

2. That on the 4th day of September, 1957, an
Order was made by the Referee herein, and filed in
this Court, a copy whereof is hereto annexed,
marked "Exhibit A" and made a part hereof.

3. Your petitioner being aggrieved by the said
Order prays for a review thereof and complains that
the Court committed error in making the said Order
in the particulars as set forth in the following para-
graphs.

4. The Referee erred in respect to said Order,
in that the Referee's Finding Number I is clearly
erroneous in that said Finding is not supported by
the evidence adduced at the hearing on said [22]
matter.

5. The Referee erred in respect to said Order, in
that the Referee's Findings of Fact Number II is
clearly erroneous in that said Finding is not sup-
ported by the evidence adduced at the hearing on
said matter.

6. The Referee erred in respect to said Order, in that the Referee's Finding of Fact Number III is clearly erroneous to the limited extent that said Finding might be regarded as implying that March 28th, 1956, was the date on which Robert H. Shutan was employed as attorney on behalf of the bankrupt corporation, the uncontradicted evidence being that Robert H. Shutan was retained on behalf of the bankrupt corporation on April 4th, 1956.

7. The Referee erred in respect to said Order, in that the Referee's Finding of Fact Number IV is clearly erroneous, in that the Referee omits to find (line 1, page 3, of said Findings) that the cash with which Milo M. Turner paid said employees, constituted personal funds of said Milo M. Turner and not funds of the bankrupt corporation, this being the uncontradicted evidence adduced at the hearing on said matter.

8. The Referee erred in respect to said Order, in that the Referee's Conclusion of Law Number I is clearly erroneous. The Conclusion that the bankrupt corporation is the alter ego of Milo Turner and said Milo Turner is generally liable for the debts of said corporation is not supported by the evidence adduced at said hearing. The Conclusion that Robert H. Shutan was in a fiduciary relationship with the bankrupt corporation fails to state the date of the commencement of said fiduciary relationship; and there is no evidence to support a conclusion that Robert H. Shutan was in a fiduciary relationship with the bankrupt corporation prior to April

4th, 1956. The Conclusion that Robert H. Shutan was in a fiduciary relationship with Milo M. Turner as an individual is not supported by any [23] evidence adduced at said hearing.

9. The Referee erred in respect to said Order, in that the Referee's Conclusion of Law Number II is clearly erroneous in law, in concluding that Milo M. Turner would not have been entitled to priority under Section 64 a(2) of the Bankruptcy Act, for a claim based upon the above-mentioned payroll checks for which he paid full cash consideration out of his personal funds.

10. The Referee erred in respect to said Order, in that the Referee's Conclusion of Law Number III is clearly erroneous.

11. The Referee erred in respect to said Order, in that the Referee's Conclusion of Law Number IV that the fee of Robert H. Shutan, as attorney for the bankrupt, is subject to determination and review by the Court under Section 60 b of the Bankruptcy Act. Assuming a typographical error in the Referee's Order and that Section 60 d of the Bankruptcy Act is the Section to which reference was made, the said Conclusion of the Referee is likewise and equally clearly erroneous, it being assumed that the "fee" referred to in said Conclusion of Law is the assignment to Robert H. Shutan of the subject payroll checks, it being indisputably established that no payment was made to said Robert H. Shutan by or from the funds of the bankrupt corporation.

Wherefore, your petitioner prays that said Order be reviewed by a Judge of this Court and that the Referee promptly prepare and transmit to the Clerk thereof his Certificate thereon, together with a statement of the questions presented and a transcript of the evidence taken at the hearing or a summary thereof and all exhibits therein offered.

Dated September 12th, 1957.

/s/ ROBERT H. SHUTAN,
In Pro. Per.

Duly verified.

[Endorsed]: Filed September 13, 1957. [24]

[Title of District Court and Cause.]

CERTIFICATE ON REVIEW OF REFEREE'S
ORDER OF SEPTEMBER 4, 1957

To: Hon. William C. Mathes, United States District
Judge:

The undersigned, Joseph J. Rifkind, a Referee in Bankruptcy of the above-entitled court, does hereby certify as follows:

Statement of Case

The petitioner on review filed a priority claim on June 21, 1956, which has been designated upon the court's records as Claim No. 79, in the amount of \$1,531.45. The trustee in bankruptcy on June 21,

1957, filed an objection to the allowance of said claim, which was sustained by the court. The claimant, feeling aggrieved by the order disallowing said claim as a priority claim and subordinating the same as a general claim to the payment of the debts of the bankrupt corporation, has filed his petition for review.

Summary of Evidence

The bankrupt was adjudicated on May 11, 1956. Debts are scheduled in amount of \$171,101.03. There will be very little, if any, dividend payable to general unsecured creditors. Irving I. Bass ever since May 21, 1956, has been and now is the duly appointed, qualified, and acting trustee in bankruptcy in this matter.

Milo M. Turner has, ever since the inception and formation of the bankrupt corporation, been its President, sole stockholder, and general manager. All of the debts of the bankrupt corporation set forth in the schedules on file were contracted by the bankrupt corporation under the control and domination of said Milo M. Turner. That for some time prior to bankruptcy and until immediately preceding the filing of the bankruptcy, said Milo M. Turner was the sole officer and director of the bankrupt corporation. That immediately prior to the filing of the bankruptcy proceedings said Milo M. Turner appointed and designated one Stanley M. Sorenson as Secretary of the bankrupt corporation. That said appointment and designation of Stanley M. Sorenson as Secretary was solely for the conven-

ience of Milo M. Turner and in order that the Petition for Arrangement and Schedule of Assets and Liabilities could be filed by the president and secretary of the corporation.

That prior to the filing of the bankruptcy proceedings said Milo M. Turner caused the bankrupt corporation to issue checks to numerous of its employees in payment of the services rendered by them to the corporation. That the payroll checks issued by said bankrupt corporation under the domination and control of said Milo M. Turner were dishonored by the bank upon which the same were drawn because the bankrupt corporation had insufficient funds on deposit with which to pay said checks. That said Milo M. Turner, after said checks had been dishonored, borrowed funds and paid said employees in cash. That said employees upon receiving such cash delivered said dishonored checks to said Milo M. Turner and that said dishonored checks so turned over and delivered to Milo M. Turner totalled the sum of \$1,531.45.

That shortly prior to the filing of the bankruptcy (arrangement) proceedings said Milo M. Turner consulted Robert H. Shutan, an attorney at law, relative to the financial difficulties of the bankrupt corporation and for the purpose of filing an arrangement proceeding on its behalf. That on or about April 4, 1956, being the day prior to the filing of the bankruptcy proceeding, Milo M. Turner transferred and delivered to said Robert H. Shutan, said dishonored payroll checks totalling \$1,531.45, in

payment of the retainer of said Robert H. Shutan in the sum of \$1,500.00 for legal services rendered and to be rendered by him in said bankruptcy proceedings.

That said Robert H. Shutan on June 21, 1956, filed a priority claim which has been designated on the court's record as Claim No. 79, for the sum of \$1,531.45. That thereafter on June 21, 1957, the trustee in bankruptcy filed objections to the allowance of said claim as a priority claim and also on the ground that the amount paid to said Robert H. Shutan for legal services rendered and to be rendered in connection with said bankruptcy proceedings was excessive and that the reasonable amount to be allowed to the attorney for the bankrupt should be fixed and determined by this court.

That based upon the facts as herein set forth the referee determined that said claimant was not entitled to a priority claim and that said claim if it was a general claim should be subordinated to the payment of all other general claims of the bankrupt estate. The referee in making said ruling did so upon the basis that the bankrupt corporation was for all intents and purposes the alter ego of Milo M. Turner and that the money advanced to or expended on behalf of said corporation was a capital investment but if it were a claim that it should upon well established equitable principles be subordinated to the payment of the debts of the corporation incurred under the domination and control of its principal stockholder.

The referee further determined that Robert H. Shutan as attorney for the bankrupt corporation, retained in connection with advising it in regard to its financial difficulties and for the purpose of filing arrangement proceedings on its behalf was not a bona fide purchaser for value but an assignee with notice that said checks transferred to him had been dishonored and with knowledge of the relationship which said Milo M. Turner bore to the corporation and as such assignee, he could not acquire any greater rights and should not be placed in any more favorable position than that of his assignor, Milo M. Turner.

The order sustaining the objection to the claim was expressly made without prejudice to the right of Robert H. Shutan to duly present a petition for fees as attorney for the bankrupt in due course of administration, so that a reasonable allowance could be made for services rendered.

Order of Referee in Bankruptcy

The findings of fact and conclusions of law are incorporated in and made part of the order dated September 4, 1957, from which the review has been taken.

Questions Presented on Review

The Petition for Review asserts the following errors, to wit:

1. That findings of fact Nos. 1, 2, 3 and 4 are erroneous as not being supported by the evidence.

2. That conclusions of law Nos. 1, 2, 3 and 4 are erroneous as not being supported by the evidence.

3. That the order is erroneous for the reason that the conclusions of law are not supported by the evidence.

Documents Transmitted With Certificate on Review

There are transmitted with this Certificate on Review the following documents, to wit:

1. Priority claim of Robert H. Shutan filed June 21, 1956, designated upon the court's record as Claim No. 79, for the sum of \$1,531.45.

2. Objection of Trustee in Bankruptcy to Priority Claim of Robert H. Shutan filed June 21, 1957.

3. Claimant's Exhibit No. 1 introduced at the hearing on August 8, 1957.

4. Findings of Fact, Conclusions of Law and Order dated September 4, 1957.

5. Petition for Review of Robert H. Shutan filed September 13, 1957.

6. Transcript of hearing on August 8, 1957.

7. Notice of Filing of Certificate on Review dated October 16, 1957.

The delay in transmitting the Certificate on Review was occasioned by the fact that the petitioner on review belatedly ordered the transcript written

up and the transcript was not received from the court reporter until October 15, 1957.

Dated: October 16, 1957.

Respectfully transmitted,

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed October 16, 1957.

[Title of District Court and Cause.]

NOTICE OF FILING CERTIFICATE
ON REVIEW

To: Robert H. Shutan, Claimant in Propria Persona and Craig, Weller & Laugharn, Attorneys for trustee in bankruptcy.

Notice is hereby given that the undersigned Referee in Bankruptcy has this date filed with the clerk of the above-entitled court his Certificate on Review of the Order dated September 4, 1957.

Rule 204(d) of the court provides that the reviewing party, within ten (10) days after the mailing of the notice of the filing of the certificate on review, shall serve upon the respondent and file with the clerk in duplicate a memorandum of points and authorities, and that the respondent shall in like manner, serve and file a reply memorandum of points and authorities within five (5) days thereafter.

Dated: October 16, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed October 16, 1957. [27]

[Title of District Court and Cause.]

OPINION

Irving R. Kaufman, D. J.

This is a petition for review of an order by the referee in bankruptcy denying the allowance of a priority claim in the amount of \$1,531.45.

The bankrupt was adjudicated on May 11, 1956. Prior to the filing of the Petition for Arrangement under Chapter XI, the bankrupt corporation in payment of various wage claims against it issued a number of checks which were subsequently dishonored by the bank upon which they were drawn because of insufficient funds. Thereupon Milo M. Turner, an officer, director and sole shareholder of the bankrupt corporation, personally borrowed outside funds and paid the employees in cash receiving in exchange the dishonored checks totalling \$1,531.45. On April 4, 1956, the day before the filing of the bankruptcy proceedings, Milo M. Turner transferred and delivered to claimant, Robert H. Shutan, these dishonored payroll checks in payment of a \$1,500 retainer of Mr. Shutan for legal services rendered and to be rendered by him in the bankruptcy pro-

ceedings. Upon receipt of these checks claimant assumed the responsibility of preparing and filing the necessary bankruptcy papers and representing [50] the bankrupt corporation in the ensuing proceedings.

The claimant alleging a valid assignment of a wage claim, filed on June 21, 1956, his priority claim under Section 64(a)(2) of the Bankruptcy Act, 11 U.S.C., Section 104(a)(2). It is claimant's contention that these checks having been delivered to Turner for good and valuable consideration paid out of Turner's own funds, the rights inherent in such checks vested personally in Turner and that the subsequent assignment transferred such rights to claimant. Objections to the allowance of this claim were duly filed by the trustee and upon submission of the issue to the referee a decision adverse to the claimant was rendered. The referee in disallowing the claim did so on the ground that the bankrupt corporation was for all intents and purposes the alter ego of Milo M. Turner and that the money advanced to or expended on behalf of the bankrupt corporation was a capital investment. The referee found in effect that the payment by Mr. Turner in exchange for the dishonored checks, rather than operating as an assignment, merely cancelled the wage obligation of the corporation and that the assignment of these payroll checks to the claimant created no greater rights in him than those possessed by Turner. [51] The referee further concluded that the legal fee of the claimant was sub-

ject to determination and review by the court under the provisions of Section 60(d) of the Bankruptcy Act, 11 U.S.C., Section 60(d).

The sole issue to be resolved on this review is whether the evidence adduced at the hearing before the referee is sufficient to support the finding that the bankrupt corporation was the alter ego of Milo M. Turner. The basis for the referee's determination was that Milo M. Turner was the president, sole shareholder and general manager of the bankrupt ever since its formation; that the corporate debts were contracted by him and under his direction and control; and that for some time prior to the filing of the bankruptcy petition he was the only acting officer and director of the bankrupt corporation.

In a proceeding of this kind I must accept the referee's findings of fact unless clearly erroneous. However, in the instant case, I find that even if I adopt all the underlying facts supporting the referee's conclusions they are still insufficient in law to establish the relationship by which the bankrupt corporation is to be regarded as the alter ego of Milo M. Turner. The mere fact that all of the corporate stock is held by one person who exercises sole control over the corporation is insufficient to [52] justify disregarding the corporate entity. *Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service*, 217 Cal. 124, 17 P. 2d 709 (1932); *Norens Realty Co. v. Consolidated A. & T. Co.*, 80 Cal. App. 2d 879, 182, P. 2d 593 (1947). Before a court may

disregard the fiction of separate corporate existence it must appear that:

“the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice. Bad faith in one form or another must be shown * * *”
Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, supra, at 129, 17 P. 2d at 711.

See also *Wenban Estate v. Hewlett*, 193 Cal. 675, 696, 227 Pac. 723, 731 (1924).

In the instant case there is no charge that the monies used to pay the wage arrearages belonged to the bankrupt corporation. Rather the uncontradicted evidence discloses that the sums were loaned to Mr. Turner by third parties and prior to payment were his own personal property. As such there is no element of bad faith or impropriety in the use of these sums to reimburse the employees of the corporation for the value of their services. The piercing of the corporate veil here would work a requirement on the sole shareholder of this bankrupt corporation to turn over his own property to pay the corporate debts and expenses of corporate bankruptcy administration in [53] the absence of a showing of fraud on creditors. See 5 *A Remington, Bankruptcy* 154 (5th ed. 1953); *Re Burlingame Products Co. v. Mackay*, 170 F. 2d 29 (C.A. 9, 1948). I must conclude, therefore, that on the basis of the facts before him the referee was in error in con-

cluding that the bankrupt corporation was the alter ego of its sole stockholder.

Section 64(a)(2) of the Bankruptcy Act provides that a claim for wages earned within three months preceding bankruptcy is entitled to priority. Such a claim may be freely assigned and will carry with it into the hands of the assignee the same priority it had in the hands of the original owner. 3 Collier, Bankruptcy 2096-97 (14th ed. 1956); See *Shropshire Woodliff & Co. v. Bush*, 204 U. S. 186 (1907). It is immaterial that the assignment be made to a stockholder of the bankrupt corporation. In *re Door Pump and Mfg. Co.*, 125 F. 2d 610 (C.C.A. 7, 1942) a group of stockholders paid employees of the corporation the amount of their claims for services in return for an assignment of such wage claims. Although under the applicable Wisconsin law the shareholders were personally liable for unpaid wage claims the court allowed the priority of the assigned wage claims holding that the payment to employees did not operate to extinguish the debt. This [54] case is dispositive of the contention made in the present proceeding that Turner as shareholder and director cannot personally receive an assignment of the claims of the corporation employees.

The transactions involved here, when placed in proper perspective, amount to an expenditure by Turner of some \$1,500 out of his own pocket for legal services to be rendered by claimant. Payment to claimant was made by an assignment of the wage

claims which enjoyed priority under Section 64 (a)(2). This procedure was apparently invoked in order that the available cash in the possession of Turner be used to satisfy the wage demands of the corporate employees who were more in need of immediate cash than was claimant. If Turner had not expended the \$1,500 out of his own pocket in return for the dishonored checks which he subsequently assigned to claimant, the trustee in bankruptcy would have priority claims filed by the wage earners in the sum of \$1,500 and, in addition, a claim filed under Section 64(a)(1) by counsel for fees for the legal services rendered in connection with the bankruptcy proceedings. Since the net result under such circumstances would subject the assets of the bankrupt corporation to priority claims in excess of \$1,500 the creditors of the bankrupt are better off under the arrangement here employed by which only one priority [55] claim of \$1,500, rather than two, was asserted against the corporation.

Turner owed nothing to the bankrupt corporation and his payment to the wage earners must be regarded as a mere gratuitous act on his part. Such payment did not increase—but if anything decreased—the obligations the trustee would be required to pay.

Having determined that the bankrupt corporation was not the alter ego of Milo M. Turner and that the assignment of the wage claims to Turner was valid and effective, the subsequent assignment to claimant as payment for a retainer of his legal serv-

ices did not involve funds of the corporation and the referee's determination that the attorney's fee is subject to review by the court under Section 60(d) is erroneous.

The referee's determination is set aside and the claim for \$1,531.45 is to be accorded priority status. Settle order.

Dated December 30, 1957.

/s/ IRVING R. KAUFMAN,
U. S. D. J.

[Endorsed]: Filed December 30, 1957. [56]

[Title of District Court and Cause.]

ORDER SETTING ASIDE ORDER OF REF-
EREE AND ACCORDING PRIORITY
STATUS TO CLAIM

The above-entitled matter, having come on regularly for hearing before the above-entitled Court, the Honorable Irving R. Kaufman, District Judge, on the 16th day of December, 1957, at 10:00 o'clock a.m. upon the petition of Robert H. Shutan for review of an Order by the Referee in Bankruptcy denying the allowance of a priority claim in the amount of \$1,531.45; Robert H. Shutan, claimant, appearing in propria persona and Craig, Weller & Laugharn by William E. Bartley appearing for and on behalf of Irving I. Bass, Trustee in Bankruptcy; and the matter having been argued before

the Court and submitted for the Court's advisement upon such oral argument and upon written Memoranda of Points and Authorities, and the Court having duly considered the same, now, in accordance with the written Opinion of this Court, filed on December 30th, 1957, it is hereby

Ordered as follows:

1. That the Referee's determination of this matter as set forth in the Referee's Order herein dated September 4th, 1957, [57] is hereby set aside;

2. The claim of Robert H. Shutan in the amount of \$1,531.45 shall be accorded priority status and is hereby allowed as a prior claim in said amount.

Dated January 17, 1958.

/s/ IRVING R. KAUFMAN,
United States District Judge.

Approved as to Form Pursuant to Rule 7 a, as Amended:

CRAIG, WELLER &
LAUGHARN,

By /s/ WILLIAM E. BARTLEY,
Attorneys for Irving I. Bass,
Trustee in Bankruptcy.

[Endorsed]: Filed and entered January 21, [58]
1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Trustee in Bankruptcy, Irving I. Bass, in the above-entitled matter, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the "Judgment on Review" made and entered by the District Court of the United States for the Southern District of California, Central Division, on January 21, 1957.

Dated February 14, 1958.

CRAIG, WELLER &
LAUGHARN,

By /s/ WILLIAM E. BARTLEY,
Attorneys for Trustee.

[Endorsed]: Filed February 14, 1958. [59]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF
POINTS ON APPEAL

Comes Now Irving I. Bass, Appellant and Trustee in Bankruptcy for the estate of Zipco, Inc., a California corporation, and presents herewith his points on which he intends to rely in support of his contention that the District Court erred:

1. Erred in reversing the Order of the Referee, dated September 4, 1957.

2. Erred in failing to affirm the Order of the Referee, dated September 4, 1957.

3. Erred in setting aside Findings of Fact Numbers I, II, III, IV, V and VI, dated September 4, 1957.

4. Erred in setting aside Conclusion of Law Number I.

A. In not finding Milo M. Turner was the alter ego of the bankrupt;

B. In not finding that irrespective of alter ego, "Any claims Milo M. Turner has should, in equity and good conscience, be subordinated in payment to general creditors."

C. In not finding "that Robert H. Shutan, as his [64] attorney and attorney for the corporation, and as assignee, stands in no better position that the would be assignor, Milo M. Turner."

5. Erred in setting aside Conclusions of Law Numbers II, III and IV.

6. Erred in not approving and adopting all of the aforesaid Findings of Fact and Conclusions of Law.

Dated February 19, 1958.

CRAIG, WELLER &
LAUGHARN,

By /s/ WILLIAM E. BARTLEY,
Attorneys for Irving I. Bass, Trustee in Bankruptcy
for Estate of Zipco, Inc., a California Corpora-
tion, and Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 21, 1958. [65]

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy, No. 71,250—WM

In the Matter of

ZIPCO, INC.,

Bankrupt.

Before the Honorable Joseph J. Rifkind, Referee
in Bankruptcy.

REPORTER'S TRANSCRIPT OF HEARING
ON OBJECTION TO CLAIM #79 OF
ROBERT H. SHUTAN FOR \$1,531.45, ON
THURSDAY, AUGUST 8, 1957, AT 2:00
O'CLOCK P.M.

Appearances:

For the Trustee:

CRAIG, WELLER & LAUGHARN, By
WILLIAM E. BARTLEY, ESQ.

For the Claimant:

ROBERT H. SHUTAN, ESQ.

(In Pro. Per.)

Thursday, August 8, 1957, 2:00 P.M.

The Referee: In the Matter of Zipco, Inc., Objection to Claim #79 of Robert H. Shutan for \$1,531.45.

Mr. Shutan: Ready for the claimant in pro. per., your Honor.

Mr. Bartley: Ready for the Trustee.

The Referee: Very well, proceed.

Mr. Bartley: If your Honor please, the Trustee's position on the claim in the last portion, it contains an objection that the claim is void due to the failure to secure consent of the wife. That was put in through error in the objection, and is not a valid basis of objection. I would like to have the record show that was put in through error.

The Referee: Very well.

As I understand your objection it is:

(1) You hold that it is not a valid assignment of a wage claim entitling the assignee to priority under Section 64-A(2); and

(2) That the amount is excessive, and I assume that you are referring to Section 60-D of the Bankruptcy Act. Is that correct?

Mr. Bartley: That is correct.

The Referee: Very well, you may proceed.

Mr. Bartley: The Trustee will call Mr. Milo M. [2*] Turner.

The Referee: Mr. Turner, come forward and be sworn, please.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

MILO M. TURNER

called as a witness on behalf of the Trustee, being first duly sworn, was examined and testified as follows:

The Referee: Please be seated and state your full name.

The Witness: Milo M. Turner.

Mr. Bartley: Can we dispense with the usual foundational questions as to his position in the corporation, and so forth? We have examined this witness on numerous occasions, or do you want the record to be complete?

Mr. Shutan: I think we probably ought to have a complete record in this.

We can stipulate he was an officer and director and shareholder of the bankrupt corporation.

Direct Examination

By Mr. Bartley:

Q. Mr. Turner, what office did you hold in the bankrupt corporation, Zipco, Inc.?

A. President.

Q. At the time of bankruptcy were there any other [3] active officers in Zipco, Inc., other than yourself? A. Yes.

Q. What other officers were there?

A. The day we filed bankruptcy, Stanley C. Sorenson.

Q. Isn't it a fact that Mr. Stanley C. Sorenson became an officer merely for convenience to sign the schedules in bankruptcy?

(Testimony of Milo M. Turner.)

Mr. Shutan: If your Honor please, I will object to the question as being leading.

The Referee: The question is overruled.

You may answer the question.

The Witness: Yes.

Q. (By Mr. Bartley): At the time of bankruptcy who owned any stock in Zipco, Inc.?

A. Just myself.

Q. Did any other person or party ever own any stock in Zipco, Inc., other than yourself?

A. No, sir.

Q. At the time of bankruptcy had Zipco, Inc., actually issued any stock?

Mr. Shutan: I will object to that as being irrelevant. I don't see what it has to do with wage claims.

The Referee: At this moment I don't either. I assume it is preliminary at this time.

What is the purpose of these last few questions that I have been permitting to go in here? If they are [4] preliminary, what connection does it have with the claim and the objection thereto?

Mr. Bartley: I will make an offer of proof.

The Referee: Please tell me what the materiality of it is.

Mr. Bartley: The connection is to show the identity between Mr. Turner and the corporation, and to show that probably in fact it was an alter ego; that he was the corporation.

Mr. Shutan: That is no issue here.

The Referee: Let's assume for the sake of argument he was an alter ego. How would that affect

(Testimony of Milo M. Turner.)

the validity of the assignment or the reasonableness of the amount?

Mr. Bartley: I guess the correct time to ask these questions would be in the rebuttal, but it is anticipated that the claimant will claim that Mr. Turner as distinguished from the corporation picked up the labor claim checks which were assigned to the claimant, and the corporation, therefore, didn't cancel the obligation owing on labor checks, and the claim therefore is a valid assignment.

The Referee: Let me hear from you in connection with your objection, Mr. Shutan.

Mr. Shutan: There is a claim filed here on the basis of wage checks. There is an objection filed to the claim on the basis that denial that the wages were [5] assigned, and a claim that the bankrupt and not the claimant paid the claimants. There is no issue here involving the structure of the corporation or the relation of the corporation to the individual, Milo Turner, and I deny that it is the burden, as applied by counsel, of the claimant who has heretofore filed a verified proof of claim, to, as part of the claimant's case, put on evidence as to the nature of the corporation or the structure of the corporation.

The burden is on the objecting party to show some defect in the claim, and there is no issue upon which I have been advised by the pleadings here about the structure of the corporation.

(Testimony of Milo M. Turner.)

The Referee: The objection is overruled. Answer the question. Do you recall the question?

The Witness: No, sir.

The Referee: Was any stock actually issued, is my recollection. Is that correct?

Mr. Bartley: That is correct.

The Witness: Yes, sir.

Q. (By Mr. Bartley): To whom was it issued?

A. To myself.

Q. Was there ever a permit secured from the State of California Corporation's Commissioner to issue stock? A. Yes.

Mr. Shutan: May my objection be deemed to go to this [6] whole line of questioning?

The Referee: Yes.

Q. (By Mr. Bartley): Mr. Turner, did you personally guarantee any of the obligations of Zipco, Inc.? A. Yes, I did.

Q. Approximately how much in dollars and cents worth of obligations of this corporation did you guarantee? A. I don't remember.

Q. Do you recall any of the accounts that you did guarantee?

A. No, I am not sure, two or three of them.

Q. Did you personally guarantee an account with S.C.O.? A. Yes, I believe I did.

Q. Did you personally guarantee an account with Aetna Factors Corporation?

A. No, I don't believe I did guarantee that.

Q. Did you personally guarantee the payment of some sums to a Mr. Harry Halts?

(Testimony of Milo M. Turner.)

The Referee: Aren't we getting pretty far away from a preliminary question?

I overruled the objection because I felt that counsel couldn't prove his case all at one time, but I think we are getting away from preliminary questions. The Court does not see the materiality of these last few questions.

Mr. Bartley: Yes, your Honor. I will withdraw the [7] last question.

The Referee: I am willing to let you be heard if you can show me the materiality of it, but I don't see it at the moment.

Q. (By Mr. Bartley): Are you acquainted with Mr. Shutan? A. Yes.

Q. When did you first become acquainted with Mr. Shutan?

A. When I hired him to represent Zipco to file under a Chapter XI proceeding.

Q. That was approximately how long prior to the time that the petition was actually filed?

A. Four or five days, to the best of my recollection.

Q. Did you make any agreement with Mr. Shutan regarding the means by which this compensation would be paid? A. Yes.

Q. What was the discussion between you and Mr. Shutan?

Mr. Shutan: If counsel will limit his questions to the discussion regarding the compensation, I won't object.

(Testimony of Milo M. Turner.)

Q. (By Mr. Bartley): Relating to compensation is the way that I meant the question. [8]

A. He wanted \$1,500 as a retainer, and I didn't have it, nor did the corporation.

I said I would see what I could do about raising the money, after I got home, that is.

In the meantime I had received \$1,000 in cash from a man by the name of Robinson, and I asked my wife to borrow \$1,500 on her furniture, and out of this \$2,500 I had picked up approximately \$1,500 in employees' checks. In other words, I had them endorse it, and I had given them the cash.

Then I had retained the checks, and I thought I could turn those in and get the cash back.

However, I talked to Mr. Shutan over the phone, and I said, "I don't have \$1,500, but I can assign these labor checks to you in lieu of your retainer."

He was a little hesitant about it, but he finally consented to do that.

Q. What connection did Mr. Robinson have with you?

A. He was a superintendent of Zipeco in production.

Q. I couldn't hear your answer.

A. He was superintendent of production.

The Referee: What is that man's name?

The Witness: R-o-b-i-n-s-o-n.

The Referee: What is his first name or initial?

The Witness: Richard R., I believe.

Q. (By Mr. Bartley): Did you inform Mr. Robinson [9] the purpose of obtaining this \$1,000?

(Testimony of Milo M. Turner.)

A. No. He owed it to me, and he sold Sierra Coffee Corporation. When he sold that he gave me the \$1,000 which he owed to me. Actually he owed me more than that, but it was a part payment of what he owed me.

Mr. Bartley: I have no further questions.

The Referee: You may cross-examine.

Mr. Shutan: I have no cross-examination.

The Referee: Do you want to call him as your own witness now?

Mr. Shutan: May I withdraw my comment?

No, I have no cross-examination. I would like to reserve my examination of Mr. Turner until it is my case in chief.

The Referee: You may step down.

Mr. Turner, resume the stand. I would like to ask you a few questions.

Q. Mr. Turner, attached to the proof of claim of Robert H. Shutan, which appears upon the court records as claim No. 79, are photostats of numerous checks. I want you to look those checks over, and I will ask you if those are the checks that you picked up, to use your expression, from your employees after you received the \$1,000 cash from Mr. Robinson, and your wife had borrowed \$1,500 on her furniture? A. Yes. [10]

Q. Were these checks all issued to employees of Zipco? A. Yes, sir.

Q. Had they all bounced, to use the vernacular; had they been returned by the bank for insufficient funds?

(Testimony of Milo M. Turner.)

A. I don't know if they had or not, all of them; some of them had.

Q. In any event, you picked up the checks from the employees of Zipco and you paid them cash?

A. Yes.

Q. How long did you have these checks in your possession before you made this arrangement with Mr. Shutan?

A. Not very long, sir; some of them a week, some of them two days. Probably they were all about the same time.

Q. I note that one of the checks attached to this proof of claim is a check in favor of R. A. Robinson for \$124.50, dated February 24, 1956. Is that the same Mr. Robinson who paid you the \$1,000?

A. Yes.

Q. And calling your attention to that date, the fact that the bankruptcy proceedings, that is, the Chapter XI proceedings were filed April 11, 1956, and this check is dated February 24, 1956, does that refresh your recollection as to how long you had this check in your [11] possession?

A. No. I didn't have it very long. He had held it.

Q. Even though it is dated—

A. When the company was hard up a lot of employees were very loyal, and they held their checks rather than cash them, because—well, some of the employees like Sorenson and Robinson held their checks quite awhile, as long as they were able to.

Q. Most of these checks were issued some time

(Testimony of Milo M. Turner.)

before bankruptcy. Many of them are February checks, and some are March checks. I think the last one issued is dated March 30, 1956, to Lawrence Delorto.

A. There was a keeper in the place at all times. We couldn't discount the receivables.

Q. By that you mean a Sheriff's keeper?

A. Yes.

Q. In other words, someone attached the place of business and put a keeper in charge?

A. Yes.

Q. How long was the keeper there before Mr. Shutan filed the Chapter XI on your behalf?

A. About 60 days.

The Referee: As a result of the Court's questions do either counsel have further questions?

Sometimes when the Court asks questions it prompts [12] counsel to ask further questions.

Mr. Bartley: I have one or two questions.

Q. (By the Referee): Mr. Turner, you were actually managing this corporation, were you not? By that I mean in addition to being president you were the general manager in charge of the corporation? A. I was the responsible officer.

Q. You signed checks?

A. Yes, but the bookkeeping was not done by me.

Q. You hired and fired the personnel?

A. I had the final word, but the general manager was the one that made the recommendation, and I

(Testimony of Milo M. Turner.)

generally did what he said. I didn't know too much about that type of business.

Q. You were in charge of the financing of the corporation?

A. I was supposed to be in charge of raising the money. I countersigned the checks with other people.

Mr. Bartley: If your Honor please, I have no further questions.

Cross-Examination

By Mr. Shutan:

Q. Mr. Turner, I show you a typewritten letter, which appears to be an original, dated April 4, 1956, consisting of a page and one-half. On page 2 appears the [13] signature bearing the name "Milo M. Turner." Is that your signature? A. Yes.

Q. Do you recognize this letter? A. Yes.

Q. This is a letter by which you retained me on behalf of the corporation to file the Chapter XI proceeding on behalf of the corporation and in which you agreed that the compensation should be \$1,500 as a retainer, and which you assigned or purported to assign to me wage checks of employees of Zipco totaling \$1,531.45. Is that correct?

A. Yes.

Mr. Shutan: I would like to have this marked, so I can go forward with my questioning.

The Referee: The letter from Milo M. Turner to Robert H. Shutan dated April 4, 1956, will be received as Claimant's No. 1.

(Testimony of Milo M. Turner.)

CLAIMANT'S EXHIBIT No. 1

April 4, 1956.

Mr. Robert H. Shutan,
Attorney at Law,
433 South Beverly Dr.,
Beverly Hills, Calif.

Dear Mr. Shutan:

Zipco, Inc., of which I am President, Director and major shareholder, has desired to employ your legal services for the purpose of preparing and filing Chapter XI proceedings on behalf of the corporation and generally representing it in pursuit of the successful arrangement thereunder. However, the corporation has no funds with which to pay you a retainer for such services. In consideration of your agreeing to act as counsel for the corporation, I agree to pay you the sum of Fifteen Hundred (\$1,500.00) Dollars as retainer therefor, and in connection with and in payment of the substantial portion thereof, I hereby hand you and also assign and transfer to you all of my interest in and to the following payroll checks of Zipco, Inc.:

Payee	Date	Amount
Charles K. Ailey.....	2/29/56	\$ 1.81
Bart Pierce	3/16/56	25.26
Charles K. Ailey	2/24/56	85.14
R. A. Robinson	2/24/56	124.50
Inez L. Marek	3/ 2/56	65.22
Ernest R. Kolehmainen	3/ 9/56	135.02
Inez L. Marek	3/ 9/56	57.81

(Testimony of Milo M. Turner.)

Sylvester A. Marek	3/ 9/56	\$ 36.42
Jean Kerwin	3/ 9/56	80.90
Milo M. Turner	3/ 9/56	97.00
Stanley C. Sorenson	3/ 9/56	78.90
Gus Langensiepen	3/16/56	85.14
Bill Scott	3/16/56	74.81
Stanley C. Sorenson	3/16/56	80.90
Marge Helper	3/16/56	61.55
Jean Kerwin	3/16/56	80.90
Milo M. Turner	3/16/56	97.00
Stanley C. Sorenson	3/23/56	80.90
Milo M. Turner	3/23/56	97.00
Lawrence Dellorto	3/30/56	85.27
		<hr/>
Total		\$1,531.45

I represent to you that each of the above is a check for wages earned in the employ of Zipco, Inc., and that each of these employees has been paid the full face amount of such check and has endorsed such check in consideration for said payment; [16] and I further represent that none of the moneys used in payment of the above checks constitute funds of Zipco, Inc., but on the contrary, all of these checks were paid from my personal funds and these checks constitute assignments of the wage claims represented thereon.

Very truly yours,

/s/ MILO M. TURNER.

Encs.

Received August 8, 1957.

(Testimony of Milo M. Turner.)

Q. (By Mr. Shutan): Referring to Claimant's No. 1, Mr. Turner, referring to the last paragraph starting at the bottom of page 1, I will read it to you and I will ask you to listen very carefully.

"I represent to you that each of the above"—this refers to a number of checks listed by payee, date and amount——

"each of the above is a check for wages earned in the employ of Zipco, Inc., and that each [14] of these employees has been paid the full face amount of such check, and has endorsed such check in consideration for said amount.

"I further represent that none of the moneys used in payment of the above checks constitute funds of Zipco, Inc., but on the contrary, all of these checks were paid from my personal funds, and these checks constitute an assignment of the wage claims represented thereon."

Is that what is stated in that letter?

A. Yes.

The Referee: Don't you think the letter speaks for itself, and the Court can read the letter?

Mr. Shutan: Very well.

Q. Was that a true and correct representation?

Mr. Bartley: I will object to that question "Is that a true and correct representation?" The statements are self-serving statements, containing legal conclusions, which would not be a proper question.

Mr. Shutan: I am cross-examining the witness

(Testimony of Milo M. Turner.)

as to what the particular arrangement was which is the issue of this whole case.

The Referee: The objection will be sustained.

In other words, this witness cannot testify whether the money was his own money or the corporation's money. [15] That is a matter for the Court to determine. You are calling for a conclusion, and that is the basis of sustaining the objection of counsel.

Q. (By Mr. Shutan): Do you know the source of the funds that were used in the payment of these checks? A. Yes.

Q. Is it as you have just heretofore testified, from the \$1,000 that you received from Mr. Robinson together with the \$1,500 or so that Mrs. Turner turned over to you from mortgaging the furniture?

A. Yes.

Q. Is it correct that no other funds were used as a source of payment of these particular checks?

A. No.

Q. And particularly, that no funds were withdrawn from the corporation or any of the corporation's assets for these checks?

A. That is right.

Mr. Shutan: I would like to have this in evidence.

The Referee: Claimant's 1 has already been received in evidence.

Mr. Shutan: I thought it was marked for identification.

Q. Mr. Turner, is it not correct that prior to the time that you contacted me in relation to the

(Testimony of Milo M. Turner.)

financial difficulties of Zipco, Inc., that you knew me not at all? [16] A. That is right.

Q. We had never met previously?

A. That is right.

Q. Is it not correct that I told you that before I would accept the responsibility of representing your corporation, Zipco, Inc., and preparing and filing and representing it in a Chapter XI proceeding, that I would have to receive from the corporation or from some outside source an advance retainer? A. Yes.

Q. And it is correct, as I believe you have already testified, that I eventually agreed to accept an assignment from you of these wage checks on account of said retainer? A. Yes.

Q. It is further true, is it not, that upon being retained by the corporation I immediately and forthwith proceeded to the work involved in the preparation of these papers and documents for filing under a Chapter XI proceeding of the Bankruptcy Act on behalf of Zipco, Inc.? A. Yes.

Mr. Shutan: I have no further cross-examination.

The Referee: Anything further?

Mr. Bartley: Yes, your Honor, I have a couple of questions. [17]

claim, but so the record is clear, I have the originals here, and if we may formally have it noted by agreement of counsel and approval of the Court that the photostats may be deemed to be therein satisfactorily in lieu of the originals——

Mr. Bartley: We will so stipulate. We have checked the books and records of the bankrupt and have checked the authenticity of the checks and know that those are photostats of the checks.

Mr. Shutan: I accept that stipulation if the Court will approve it.

Do I also understand that portion of the objection that refers to the consent of the spouse on the assignment has been stricken from the objection?

The Referee: Nothing has been stricken in the objection. If proof is not made to conform, the Court will rule upon it, but the Court is not striking it.

The motion is denied.

Mr. Shutan: I am not making a motion. [20]

The Referee: He may be abandoning it, but you are both experienced enough to understand that it is not stricken from the claim.

Mr. Shutan: Is it correct that you are abandoning on behalf of the Trustee that portion of the objection?

The Referee: Counsel for the Trustee has so stated that he is not relying upon that portion of his objection to the claim. In other words, that is no longer an issue in the objection.

Mr. Shutan: May I as appearing in pro. per. take the witness stand?

The Referee: Yes. It is very important to you that you do.

ROBERT H. SHUTAN

the claimant herein, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

The Referee: Please state your full name for the record?

The Witness: Robert H. Shutan.

Your Honor, when I wish to speak as a lawyer as distinguished from a witness——

The Referee: You are now talking as a witness; you are not talking as a lawyer. You are taking the stand in your own behalf. [21]

Please be seated and just testify as a witness.

The Witness: My name is Robert H. Shutan. I am an attorney at law, licensed to practice by the State of California, with my office at 433 South Beverly Drive, Beverly Hills, California.

I have been admitted to practice since the year 1943, and I have been specializing in the practice of bankruptcy and insolvency law since 1947.

I first heard of the corporation referred to as Zipco, Inc., somewhere around April 1, 1956. I was contacted by Mr. Milo M. Turner, who identified himself as the president and major shareholder of the corporation.

He stated that I had been recommended to him as a specialist in insolvency and Chapter XI proceedings, and it had been suggested to him that Chapter

(Testimony of Robert H. Shutan.)

XI would be a subject matter that might well be considered on behalf of his corporation.

I discussed the matter at length with Mr. Turner, and got to the matter of fees for myself as counsel for the corporation.

The substance of our conversation was that I would have to have a substantial cash retainer before I would undertake the responsibility of representing this corporation in the Chapter proceedings in the Federal Court.

The figure finally discussed was that of \$1500.

Mr. Turner stated to me he would attempt to raise [22] this amount of money.

He stated that the corporation was short of cash, but he felt that he had personal and private resources from which he could raise the necessary money.

I was contacted subsequently by Mr. Turner, who reported that he had raised the money, but that he felt quite disturbed about the amount of unpaid wage claims, and that he had used the money to make up some of the most distressed wage situations of employees who had dire needs, and other checks that had put employees in embarrassing positions; that he had used these checks, that he had purchased these checks with his personal funds, and received endorsements of them, and he had no remaining cash for my retainer.

I believe that he asked me—let me put it this way: he said that is the closest to cash that he had, would I take that on account of the retainer? He

(Testimony of Robert H. Shutan.)

asked me in substance wasn't that for practical purposes the same as cash?

I gave this, naturally, some considerable thought, and checked the law on it, and I determined that the difference was simply a time element, that these would be perfectly valid assignments of wage checks, and that I would simply have to wait for my money until a prior wage claim was paid from the debtor's estate or from any succeeding estate. [23]

I therefore agreed to take those checks, and Mr. Turner brought them into my office. I gather it was on April 4, 1956, because the letter which is Claimant's Exhibit 1 was typed out in my office and signed by Mr. Turner in my office at the time when he handed me the endorsed checks, and at the time when and upon which I agreed to accept the responsibility of representing the corporation and filing the Chapter proceedings.

Your Honor, the further testimony which I wish now to give is addressed to the nature and amount and value of my services, and I give it solely because my motion was overruled regarding that portion of the objection which relates to value of services. It is my position that is totally irrelevant.

The Referee: You are testifying; you are not arguing.

The Witness: May I step down, then?

The Referee: No, you are now a witness. You may offer any testimony now, and at the end of

(Testimony of Robert H. Shutan.)

the case you may argue the case, but don't argue it from the witness stand.

The Witness: All right, sir.

I proceeded to explore all of the factual background that I could in relation to the affairs of Zipco.

I asked Mr. Turner to have compiled for me and to bring in as soon as possible, immediately, if possible, financial information, balance sheets, profit and loss [24] statements, copies of executory contracts, whether they be a lease on the premises or machinery leases or whatever they may be. I wanted him to bring into me all information.

Because of the crucial cash position of the company and the fact that there was either a Sheriff or a Marshal in there—they previously made an assignment for the benefit of creditors which had been made within the week previous, and which had been ineffective, and the continuing operation would have been purposeless unless some immediate steps were taken.

I determined that there was not sufficient time to compile accurately all of the necessary information for the schedule of assets and liabilities before filing the current proceedings, so I further determined that then the best procedure in the interest of the corporation and its creditors would be to seek leave of the District Court to file a petition under Section 322 of the Bankruptcy Act, with leave to ask for 10 days' delay in the filing of the schedules of assets and liabilities and statement of affairs.

(Testimony of Robert H. Shutan.)

Accordingly, I prepared on behalf of the debtor corporation a petition for leave to file proceedings under Section 322, Chapter XI of the Bankruptcy Act and extending the time to file schedules, and attach as an exhibit to that a list of the ten largest unsecured [25] creditors, in accordance with the requirements and desires of the District Court.

I attached also to that proceeding for arrangement, in other words, the Chapter XI originating documents, and in connection with the proceedings for arrangement I prepared and attached and filed a proposed plan of arrangement, which was in accordance with what Mr. Turner and I had previously discussed.

In effect it would have been a general extension and eventual payment of 100 cents on the dollar to the general unsecured creditors, as an exhibit to the plan of arrangement.

I prepared from the information made available to me a statement of executory contracts, and I had to go into these to some extent.

There was a lease on the business premises at 6218 South Wilton Place, with a monthly obligation of \$625.

There were a number of leases on machinery and equipment, Booth Heating Company, a major lessor of industrial machinery had a substantial amount of equipment in there, and they were receiving \$1500 a month as rent.

National Leasing Corporation had equipment in there, and they were receiving \$189 a month.

(Testimony of Robert H. Shutan.)

Masco Machinery had equipment in there under a contract, and they were receiving \$210 a month.

Those were the lease contracts. Then there were [26] other executory contracts.

The Referee: The list is attached to the schedules that were filed herein.

In other words, your client gave you a list of the executory contracts and attached them to and made them part of the petition filed. Is that correct?

The Witness: Yes.

I am also stating during the course of the proceeding I examined into these. It wasn't just having, if I recollect, a copy of the list of contracts, but as counsel for the corporation I went into these things. That is the point I seek to make at this time.

I took the various petitions to the District Court, and obtained approval of Judge Ben Harrison for the filing, then I proceeded to file in accordance with the authorization of Judge Harrison.

Incidentally, because of the precarious position of the company, I proposed in the plan that either there be a debtor in possession arrangement or that a receiver be appointed. We did not object to the appointment of a receiver. As a matter of fact, in subsequent consultation, I believe, with the Referee, I did recommend the appointment of a receiver, and the Referee did appoint a receiver.

I went to the plant of Zipco on South Wilton and

(Testimony of Robert H. Shutan.)

personally examined the premises and the setup there and acquainted myself with their physical and objective [27] problems, as well as the more important legal aspects of their problems.

In connection with the performing of services in the Chapter XI proceeding I acted here, as is my custom, to familiarize myself as thoroughly as possible with the operational problems of the debtor, as well as simple factual accounting information as to assets and liabilities, balance sheets and profit and loss statements, which were presented to me, and I analyzed them with the view to determining what would be the most feasible course for the debtor in the Federal Court proceedings, and in connection with one of the documents filed on the first day I prepared and attached an estimated balance sheet as of February 29, 1956, so there would be some guide to the Court and to the Referee immediately, even though the accountants and bookkeepers were then at work trying to get more accurate information.

The estimated balance sheet as of February 29, 1956, indicated a solvent condition, in the bankruptcy sense; that is, the total assets were \$244,526.14.

The total liabilities, according to the information furnished to me from the books and records of the corporation, were \$204,324.

The debtor had been engaged in——

The Referee: Just tell us what services you performed. [28]

(Testimony of Robert H. Shutan.)

The Witness: This is preliminary.

The Referee: As far as the figures themselves are concerned, the Court can read that. Just tell us what you did; what your services were, Mr. Shutan.

The Witness: I was going to discuss the S.C.O. contract, and I was only going to say preliminarily that the debtor had been engaged in the manufacture of certain kinds of bushings.

The Referee: In other words, you had conferences with your client; prepared a petition for arrangement; were present at the first meeting of creditors; you tried to get the debtor to stay in possession, which the Court denied; a receiver was appointed, and shortly thereafter operations were suspended.

Tell us what you did. In other words, merely going into statistical information of the debtor is not going to help the Court.

The Witness: Your Honor, I was only going to preliminarily say the debtor was engaged in the manufacture of drill jib bushings. Their main outlet was S.C.O. Tool Company.

It appeared from my observation that substantially all of the finished merchandise—I think it was \$60,000 worth—corresponding to what I was informed, was located at S.C.O. Tool Company, and this was the success or failure, as it first appeared, of our plan depending upon the sale [29] and the merchandising of these bushings at S.C.O. Accordingly, I examined the S.C.O. contract. I had conferences with Mr. Rodd Kelsey, attorney, who is

(Testimony of Robert H. Shulan.)

attorney for S.C.O., and I spent some hours trying to develop this situation and be fully informed and find out under what circumstances we could get the \$60,000 worth of finished bushings into the possession of S.C.O. Tool Company, and released and available for sale.

I continued those efforts in connection with the S.C.O. at the request of Mr. Bass, the Receiver, after he was appointed.

There were problems in connection with the fact that there was a Lawrence Warehousing situation for part of the merchandise. Aetna Factors was the party in interest, as I recall, and they had an obligation, my memory is, that was around \$13,000 or \$11,000, secured by a field warehousing through Lawrence Warehousing at the premises.

As part of my job as counsel for the corporation it was necessary for me to know exactly what all of their contracts and obligations and assets were. I examined into the Lawrence Warehousing situation and the Aetna Factors situation. In the meantime, the debtor was being vigilantly pressed by some of the lessors of some of the machinery and equipment.

During the period of the week of the filing there were several claim and delivery lawsuits filed. I examined [30] into these contracts. I examined into these complaints after the receiver was appointed and at the receiver's request. I continued giving what information I could in relation to these.

At the receiver's request I consulted with Mr. Turner on numerous occasions in order to assist the

(Testimony of Robert H. Shutan.)

receiver in determining his position in connection with the suit by M. W. Silverman in connection with the lease on a Rigid Mill—that is a trade name. There was a claim and delivery suit by Booth Leasing Company, and I spent a number of hours in connection with that, both on behalf of the debtor and in connection with assisting the receiver and getting information and answering his questions on that.

At the receiver's request I went to the plant again, I believe, it was on the 5th or 6th of April, and I spent a number of hours there working with the receiver and the debtor.

The receiver at that time, I believe, had been sent out by the Court to explore the possibility or the advisability or non-advisability of a receiver's operation, and I made myself available to the receiver at the plant, and rendered all possible assistance.

At the receiver's request or at the Court's request—it may have been the Court's request—I met with the receiver in court on the following day, and had a most [31] extended discussion concerning the receiver's possible operation, and the pros and cons, and contributed as objectively as I could, and I believe that was objectively my analysis of the situation.

There was a petition for reclamation filed by the Masco Machinery Company and another one by Com-Air and another one by Guy Whitaker Company.

I concerned myself with these preliminarily, and

(Testimony of Robert H. Shutan.)

later at the request of the receiver gave what assistance I could in connection with this litigation and these lawsuits.

The Referee: At this time we will take our afternoon recess.

(Recess.)

The Referee: Please proceed.

The Witness: To illustrate one of the things I have just mentioned, on April 24th, I received from the receiver, Irving I. Bass, a letter dated April 23rd, in which he sent to me a petition for order of reclamation in the Zipco matter, forwarded to me by Mr. Devor. This is the one filed by Com-Air. He wanted to discuss the matter with Mr. Turner to determine—that is, he wanted me to discuss the matter with Mr. Turner to determine whether Zipco had any claim to the tooling identified in the petition, and what was the property of the petitioner. [32]

He also in the same letter asked me to check with Mr. Turner concerning the property belonging to the Guy Whitaker Company, consisting of approximately 25,000 forgings, and to advise him whether or not this should be released to the Whitaker Company without the payment of any moneys. This was in relation to the petition for reclamation which had been filed by attorneys Gray and Gray.

In accordance with the request of Mr. Bass, I discussed the Com-Air matter with Mr. Turner. I

(Testimony of Robert H. Shutan.)

discussed the Guy Whitaker matter with Mr. Turner, and I then advised Mr. Bass in connection with the documents he sent me, the petition for reclamation, which was somewhat involved.

I believe a similar situation was in relation to the Masco Machinery petition for reclamation.

At the time I became counsel for the debtor corporation they were in the middle of a problem in connection with their lease on the premises. The property had just been sold, and the purchasers apparently were attempting to rescind, and I was contacted by representatives of the purchasers—pardon me, that is incorrect.

I was contacted by the representatives of the sellers, and had considerable discussions with, I believe, Mr. Jules Altemas of the Altemas Real Estate Company. Although he was a broker, he was a principal in that transaction, [33] and it took considerable time, having several discussions with him about the current proceedings, because apparently our proceedings were one of the key problems of the transaction of the purchase and sale of the real property, of the premises.

A considerable amount of my time, during the month of April, was concerned with contacts from creditors, inquiries from creditors, inquiries from markets and gas stations and others who had cashed checks, particularly payroll checks of the debtor corporation, and a considerable amount of time went into those telephone conversations and some correspondence on that.

(Testimony of Robert H. Shutan.)

As I stated, the District Court had allowed us 10 days within which to file the schedule of assets and liabilities. This involved a tedious amount of work, both by personnel in Zipco, the bookkeepers and myself.

I told them that the information that we put in the schedules had to be as accurate and precise as possible. We wanted every single creditor accurately listed therein, and I wanted as accurate as possible balances due on machinery contracts, conditional sales contracts and so forth. It was necessary for me to work at some length with representatives of the company to get this scheduled information. It was most involved, and as the schedules show, there were some, for example there were some \$97,000, almost \$98,000 owing on eleven encumbrances, or at least, [34] agreements for conditional sales contracts. I refer to schedule A-2 of the schedules, rather than reading them into the record here.

I had to work and devote considerable time with the bookkeepers, as I recall, in an attempt to get as accurate information as possible about the taxes owing, and for which quarters, and so forth. That presented a considerable task.

To summarize on the schedules, by the nature of the operation of this debtor and by the amount of the liabilities and the amount of the assets and the degree to which the assets were encumbered by contract and leases and so forth, there was required an extraordinary and unusual amount of

(Testimony of Robert H. Shutan.)

time by myself as counsel in the preparation of the schedules and assets and liabilities, and also in the preparation of the Statement of Affairs. Such schedules and Statement of Affairs were, of course, filed in due course.

The receiver in the meantime had determined it would not be feasible or not in the interests of the estate to have a continuing operation of the business, and he had, with the approval of the Court, discontinued the operation of the business.

The receiver, however, did consult with me, not only in the matter aforesaid, but in connection with any assistance that I or myself with Mr. Turner's help could [35] give him as far as sources of sale of some of the merchandise, some of the equipment which he had on hand, and there were a number of additional discussions which I had with Mr. Bass, the receiver, during the month of April.

I worked very closely with Mr. Turner in his effort to procure new financing. After all, this was the prime purpose of the Chapter XI, to keep this debtor alive and continuing in business, so that it might turn into a successful operation, and the creditors might be paid.

It was determined that the cessation of operation by the receiver did not of itself make impossible a successful plan, and Mr. Turner, particularly, with myself assisting somewhat went forward with efforts to obtain the necessary financing even after the termination of operations.

However, we knew we had only a limited time,

(Testimony of Robert H. Shutan.)

and Mr. Turner reported to me that he was unsuccessful in obtaining what we regarded as an arrangement, a satisfactory arrangement, for new capital, and new capital was absolutely essential if we were to have a successful plan of arrangement.

Accordingly, on my own motion I advised the Court and the receiver that we were unable to come up with a plan, and as I recall it, volunteered the thought that we did not want to string out or continue a debtor proceeding [36] that was a hopeless one, and accordingly I prepared with the consent of the corporation a document entitled, "Withdrawal of proposed plan of arrangement and consent to adjudication."

This was executed on or about the 2nd of May, 1956, and I caused it to be filed with the Court that day or shortly thereafter, which was approximately one month after I came into the case.

Subsequently I appeared on behalf of the debtor as counsel for the debtor at the first meeting of creditors after adjudication.

There was an adjudication, of course, after the first meeting of creditors on May 31, 1956. Then there was a continued first meeting of creditors on June 4th, at which time I was present on behalf of the debtor.

My notes reflect a further first meeting on June 11th. Frankly, I am not sure whether that actually occurred, or whether I was present on the June 11th meeting.

I was present at a further continued first meet-

(Testimony of Robert H. Shutan.)

ing of creditors on the 18th of June, in my capacity as counsel for the bankrupt.

Throughout these proceedings I have made myself available to the Trustee and counsel for the Trustee, and I have co-operated on every occasion that had been requested of me to advise in the administration of this [37] estate.

I would say my main services to the estate were to the receiver rather than to the Trustee, and that I rendered legal services of considerable value to the creditors and to the estate at the request of the receiver during the period of the receivership, and at a time when I was also attorney for the debtor in the fashion and manner to which I have just testified.

There were a number of other probably lesser legal problems and practical problems which came to my attention and received my attention during the period of April 4, 1956, through to the present, but particularly through the June 18th meeting of creditors.

I would estimate that in the manner to which I have testified and the services which I have performed for this estate for the debtor and in assisting the receiver, that I have expended approximately 40 to 45 hours.

I have received no compensation whatsoever from this estate or from anyone else on behalf of this estate, other than the subject payroll checks on which I took an assignment, and which is the basis of the subject claim.

The Referee: Do you wish to cross-examine, counsel?

Mr. Bartley: I have no cross-examination.

The Referee: You may step down.

Is there any further evidence?

Mr. Bartley: I have no further evidence. [38]

Mr. Shutan: I have no further evidence.

The Referee: Do you wish to be heard in this matter, Mr. Bartley?

Mr. Bartley: Yes, your Honor.

(The matter was argued by counsel.)

The Referee: The Court has heard the evidence and has heard the argument, and is prepared to rule in this matter.

We have here a bankrupt estate, and the schedules show wages, \$9,436.68; taxes due to the United States of \$13,000; taxes due to the State of California of \$3,000; secured claims of \$97,893.35; unsecured claims, \$47,741.74, or a total indebtedness of \$171,101.03.

The Court must take cognizance of the fact that the dividends, even to prior claimants, will be small, and probably there will be no dividend to general unsecured creditors, or a very, very nominal amount, if any.

These debts were incurred under the management of Mr. Turner, who was president and sole stockholder. He shaped and controlled and brought about the destinies of this corporation.

He had a legal obligation to see that the prior labor claims were paid. In fact, if the corporation

did not have money to pay labor which it incurred, there was a civil obligation on his part and a potential criminal liability also on his part. Therefore, he obtained this money and [39] picked up these checks that had been issued to wage claimants.

Certainly if he had filed a proof of claim contending that he was entitled to priority because he had paid these labor claimants, under the same circumstances the Court would not have any doubt in its mind that the claim was not entitled to priority, and any claim that he had, whether it be a prior claim or a general claim, should be subordinated to the payment of all creditors of the bankrupt estate.

Certainly an assignee can get no greater right than his assignor, and that is particularly so when the claimant is a fiduciary, standing in the position of the relation of attorney to client.

For all intents and purposes this corporation was Mr. Turner. If it was not technically his alter ego, it certainly was for all intents and purposes his alter ego in this particular matter.

It is the ruling of the Court that the claim of Mr. Turner for money be paid to these labor claimants was a general unsecured claim, and that it should be subordinated to all other claims of this estate, and that the claim of his assignee is no greater than that of Mr. Turner.

The ruling, however, is expressly made without prejudice to Robert H. Shutan as attorney for the debtor [40] and the bankrupt, in due course of administration to file his petition for reasonable al-

lowance for services which he rendered to the debtor and the bankrupt, not to the receiver.

In other words, no person is entitled to be compensated for services rendered to a receiver or trustee unless that attorney is duly authorized by order of Court to represent the Trustee in bankruptcy.

Counsel for the Trustee will prepare, serve and submit an appropriate order in this matter.

Mr. Shutan: I would like to have findings, your Honor.

The Referee: You are entitled to findings, unless you waive them.

Mr. Shutan: I would like to have findings.

The Referee: Very well.

Court will stand adjourned. [41]

Certificate

I, Louis Sommers, hereby certify that on the 8th day of August, 1957, I attended and reported, as official court reporter, the proceedings in the above-entitled and numbered matter before the Honorable Joseph J. Rifkind, Referee in Bankruptcy, in said Matter, and that the foregoing is a true and correct transcript of the proceedings had therein on said date, and that said transcript is a true and correct transcript of my stenographic notes thereof.

Dated at Los Angeles, California, this 14th day of October, 1957.

/s/ LOUIS SOMMERS,

Official Court Reporter.

[Endorsed]: Filed October 15, 1957. [42]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 66, inclusive, containing the original:

Petition for Arrangement, filed 4/5/56.

Order of Reference.

Adjudication of Bankruptcy.

Order approving Appointment of Trustee (certified copy).

Claim of Robert H. Shutan.

Objections of Trustee to Claim of Robert Shutan.

Claimant's Exhibit No. 1.

Findings of Fact, Conclusions of Law and Order re Claim of Robert H. Shutan.

Petition for Review of Referee's Order.

Notice of filing Certificate on Review.

Points and Authorities in support of Petition for Review.

Trustee's reply Memorandum to Points and Authorities in opposition to Petition for Review of Referee's Order.

Memorandum of Opinion.

Order setting aside Order of Referee and according priority status to claim.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Appellant's Statement of Points on Appeal.

B. One volume of Reporter's Transcript of Proceedings had on August 8, 1958.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60 has been paid by appellant.

Dated: March 7, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the Supplemental transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 7, inclusive, containing the original:

Certificate on Review of Referee's Order of September 4, 1957, dated October 16, 1957.

Amendment to Designation of Contents of Record on Appeal.

I further certify that my fee for preparing the foregoing record, amounting to \$1.20 has been paid by appellant.

Dated: March 11, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15938. United States Court of Appeals for the Ninth Circuit. Irving I. Bass, Trustee in Bankruptcy of Zipco, Inc., a corporation, bankrupt, Appellant, vs. Robert H. Shutan, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 10, 1958.

Docketed: March 19, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.